Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In The
SUPREME COURT Of The UNITED STATES

DANIEL L. BELL,

Petitioner,

v.

GEORGIA BUILDING AUTHORITY,

Respondent.

On PETITION For A WRIT Of CERTIORARI To The UNITED STATES COURT Of APPEALS For The ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI SUPPLEMENTAL APPENDIX

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The following is the **Supplemental Appendix** required by the Supreme Court of the United States Office of the Clerk on July 25, 2006 to be submitted promptly so that it may be docketed.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL BELL

Plaintiff,

CIVIL ACTION NO.
1:03-CV-2384-WBH-JMF

v.

GEORGIA BUILDING AUTHORITY

Defendant.

ORDER FOR SERVICE AND REPORT
AND RECOMMENDATION

Attached is the Report and Recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rules 73 and LCrR 58.1. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the Report and Recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the Report and Recommendation with objections, if any, to the district

court after expiration of the above time period.

IT IS SO ORDERED, this 8th day of July, 2005.

S/JOEL M. FELDMAN

JOE M. FELDMAN

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UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

DANIEL BELL

Plaintiff, CIVIL ACTION NO.

v. 1:03-CV-2384-WBH-JMF

GEORGIA BUILDING AUTHORITY

Defendant.

MAGISTRATE JUDGE'S REPORT AND

RECOMMENDATION

AND ORDER

Part One: History of the Case

This is a civil rights employment discrimination case, filed pro se pursuant to Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq (hereinafter "Title VII") and 42 U.S.C. § 1981, by Daniel Bell (hereinafter the "Plaintiff" or "the Plaintiff"), an African American male who was employed by the Georgia Building Authority (hereinafter "Defendant") as a Property Resource Manager. In his Complaint, the Plaintiff alleged that the Defendant violated his

civil rights by: (1) discriminating against him based on his race, in violation of Title VII, by treating him less favorably than a similarly situated white co-worker, including, inter alia, assigning fewer officers to Plaintiff's shift, disciplining the Plaintiff's subordinates more severely, and demoting Plaintiff; (2) discriminating against Plaintiff with respect to his gender in violation of Title VII; and (3) retaliating against the Plaintiff after he opposed an unlawful employment practice (i.e. (1) he complained of disparate treatment and (2) following he filed a discrimination charge with the Equal Opportunity Employment Commission (EEOC) that gave rise to the instant action) [Doc. 1]. The Plaintiff seeks, inter alia, reinstatement with no loss of benefits, an injunction prohibiting the Defendant from making disparaging remarks about the Plaintiff regarding his employment therefor, back pay and compensatory and punitive damages.

Presently pending before the undersigned are the Defendant's Motion for Summary Judgment [Doc. 38], Brief in Support [Doc. 38, Att. 1] and Statement of Undisputed Material Facts [Att. 2]. Also pending before this Court are the Plaintiff's Response [Doc. 43], consisting inter alia of the Plaintiff's Statement of Disputed Material Facts [Doc. 43, Att. 1] and Response to Defendant's Statement of Undisputed Facts [incorporated in Att. 1]. The Defendant has also filed a Reply Brief in Support of its Motion for Summary Judgment [Doc. 44].

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In its Motion for Summary Judgment, the Defendant contends that: (1) the Plaintiff cannot make out a prima facie case of race discrimination; (2) the Plaintiff cannot make out a prima facie case of gender discrimination; (3) the Plaintiff cannot make out a prima facie case of

retaliation under Title VII; and (4) the Defendant had a legitimate non-discriminatory reason (LNDR) for demoting and then terminating the Plaintiff.

Part Two: The Issues

1. Whether the Plaintiff can make out a prima facie case of disparate treatment with respect to his race.

(A) Whether the Defendant subjected the Plaintiff to adverse employment actions when it assigned fewer officers to his shift than it assigned to a white comparator, and suspended one of Plaintiff's subordinates but not the white comparator's similarly situated subordinate.

(B) Whether Plaintiff's May, 20, 2002 demotion constituted an adverse employment action.

2. Whether the Defendant had a legitimate non-discriminatory reason (LNDR) for demoting the Plaintiff.

(A) Whether Defendant has proffered an LNDR for

demoting Plaintiff.

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(B) Whether Plaintiff can create a disputed material issue of fact as to whether Defendant's LNDR was a pretext for discrimination.

3. Whether Defendant had a legitimate non-discriminatory reason (LNDR) for terminating the Plaintiff.

(A) Whether Defendant has proffered an LNDR for terminating Plaintiff.

(B) Whether Plaintiff can create a disputed issue of fact as to whether Defendant's proffered reason was pretextual.

4. Whether the Plaintiff can make out a prima facie case of Retaliation with respect to his demotion.

A. Whether the Plaintiff engaged in statutorily protected activity.

5. Whether Defendant has moved for summary judgment on Plaintiff's Retaliation claim regarding his post-termination job search.

6. Whether the Plaintiff has abandoned his Title VII claim of discrimination on the basis of his gender.

Part Three: The Facts

The Defendant has filed a Statement of Undisputed Material Facts [Doc. 38, Att. 1] in support of its Motion for Summary Judgment, and the Plaintiff has filed

a Response to the Defendant's Statement of Undisputed Material Facts [Doc. 43, Att. 1], in which he incorporates his own Statement of Disputed Material Facts. {See Footnote 1}

In Part I, this Court sets out the Defendant's undisputed facts as drawn from the Defendant's Statement

of Undisputed Material Facts, excluding statements that the Plaintiff has properly disputed. To the extent that they are not duplicative or disputed by the Defendant, in Part II, this Court sets out the Plaintiff's disputed facts as drawn from the Plaintiff's Statement of Disputed Material Facts. This Court must deem admitted those facts in a party's statement that are uncontroverted by the opposition. LR 56.1 B(2) N.D. Ga. In Part III, this Court sets out the Defendant's 'undisputed' fact statements that the Plaintiff disputes. To the extent possible, except for clarity, this Court will use the parties' own wording.

I. The Undisputed Facts

1. The Plaintiff, an African-American male, began his employment with Defendant Georgia Building Authority (GBA) as a Building Monitor on

{Footnote 1: The pro se Plaintiff did not set out

explicit arguments or conclusions of law in his Response to Defendant's Motion [Doc. 43, Main Document]; Rather, Plaintiff stated in his Response [Doc. 43, Main Doc., p. 1] that his Statement of Facts [Att. 1] show that there are disputed material issues of fact which create a genuine issue for trial. Id.}

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February 2, 1980. Complaint at ¶ 5 [Doc 1]; Deposition of Daniel L . Bells (hereinafter "Pl. Dep."), pp. 29, 39.

2. On or about April 16, 2001, Defendant promoted Plaintiff to one of three Property Resource Manager positions. Pl. Dep. pp. 30-31.

3. At the time that Plaintiff was promoted to the position of Property Resource Manager, Mike Sowell, a Caucasian male, and Bill Young, a Caucasian male, were

also promoted to the other two positions of Property Resource Manager. Pl. Dep. pp. 39-40.

4. All three Property Resource Managers reported to Brett Jones, Director of Property Resources and a Caucasian male, who served as their direct supervisor. Pl. Dep. pp. 32-33, 35-37; Affidavit of Brett Jones ("Jones Aff.") [Doc. 38, Att. 4 at ¶ 2, 4].

5. As Property Resource Manager, Plaintiff was responsible for scheduling, evaluating, training, managing, and supervising a shift of his subordinate Property Resource Officers (PRO). Pl. Dep. pp. 33-34.

6. As part of his job duties, Plaintiff also directly supervised two Lead Supervisors, who in turn supervised approximately 17 property resource officers assigned to the shift. Pl. Dep. pp. 33-35, 77.

7. Edward Smith and Sam Chiwetalu, both African-American males, served as Lead Supervisors under the Plaintiff's shift. Pl. .Dep. pp. 33-34.

8. In or about December 2001, Arthur Cardell, an African-American male, replaced Bill Young as one of the property resource managers (one of three including Plaintiff) after Young voluntarily resigned. Pl. Dep. pp. 39-41.

9. On Friday, March 22, 2002, Brett Jones advised Plaintiff that he was demoting Plaintiff to the position of Property Resources Lead Supervisor, because the Plaintiff had failed to properly operate a state vehicle, after he backed a GBA motor vehicle into a cement post while on probationary status. Pl. Dep. pp. 42-43, 47-48, 52, Ex. 2; Jones Aff. at ¶ 7, Ex.2.

10. In a letter dated March 23, 2002, Plaintiff appealed Jones's decision to demote him to Helen Scholes,

Executive Director of GBA and a Caucasian female. Plaintiff told Scholes, among other things, that he was not aware that Brett Jones had placed him on probation beginning February 22, 2002. Pl. Dep. pp. 54-55, Ex. 3; Affidavit of Helen Scholes ("Scholes Aff.") at ¶ 4, Ex. 1. Immediately thereafter, Scholes rescinded the Plaintiff's demotion.

11. On March 26, 2002, Jones placed two of his subordinates, the Plaintiff and Mike Sowell, on a 90-day probation period. Jones then wrote a nonexhaustive list of job responsibilities, which would be utilized by supervisors

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to determine job performance. The document also advised them that they would be evaluated every 30 days thereafter. Finally, the document informed them that "[a]ny incident which demonstrates actions inconsistent with your

job duties will result in demotion or disciplinary action up to and including termination." Pl. Dep. pp. 59-61, Ex. 6; Jones Aff. at ¶ 10, Exs. 5, 6; Scholes Aff. at ¶ 5.

12. Because Plaintiff worked the evening shift, during which several posts in the state buildings were closed, Defenfant assigned fewer Property Resource Officers to Plaintiff's shift than to that of Mike Sowell, who worked the busier day shift. Pl. Dep. pp. 75-76, 208-209; Jones Aff. at ¶ 13. {See Footnote 2}

13. In an attempt to assist the Plaintiff in performing his scheduling duty, Jones provided the Plaintiff with a "template," which supposedly outlined how many officers the Plaintiff would need at each open post to cover his shift on any given day of the week. Jones Aff. at ¶ 12, Ex. 7.

14. During the 90-day probation period, two keys (apparently to a building under Plaintiff's supervision) were lost during Plaintiff's shift. Pl. Dep. pp. 63-67; Jones Aff.

at ¶ 14, Exs. 10, 11.

{Footnote 2: Plaintiff disputes this statement improperly, admitting its contents and the fact that "the day shift had more activity than the evening shift," but adding the caveat that Sowell's shift required only two more posts than that of Plaintiff [Doc. 43, Att. 1, p. 8].}

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15. Jones then decided to demote Plaintiff at the end of the second 30-day evaluation period.{See Footnote 3} Pl. Dep. pp. 54-55, Ex. 3; Jones Aff. at ¶15.

16. On Monday morning, May 20, 2002, Jones spoke with Sabrina Smith, a Property Resource Officer an Plaintiff's shift. Specifically, Smith stated that she wanted to register a complaint against the Plaintiff, but she was unfamiliar with the proper procedures to follow. Jones Aff. at ¶ 16.

17. Jones then instructed Smith to write her complaint, and directed her to deliver it to him. Jones Aff. at ¶16.

18. On the afternoon of May 20, 2002, Jones notified the Plaintiff that he was being demoted to the position of "Property Resource Officer 2," and that his salary would be reduced effective June 1, 2002. The reasons Jones gave to the Plaintiff for demoting him were that he had allegedly (1) failed to perform two critical job responsibilities of a Property Resource Manager during his 90-day probation: (a) he allegedly failed to properly schedule his subordinate officers to cover all of the weekend posts; and (b) he failed to implement a "chit system" for preventing key loss, resulting in the loss of

{Footnote 3: Jones criticized the Plaintiff for not implementing a chit system to avoid lost keys, which Jones claimed was required for all buildings, including the

Archives Building, apparently where the keys were lost. In his Response, the Plaintiff stated that he was never directed to institute the system in the affected building.}

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two keys at the State Archives Building. Pl. Dep. pp. 86-88, 91, Ex. 10; Jones Aff. at ¶ 17, Ex. 13.

19. Defendant did not, however, reduce the Plaintiff's pay as a result of the attempted demotion, and Plaintiff's job duties changed only for approximately three hours on May 20, 2002. Pl. Dep. pp. 93-97, 108.

20. On May 21, 2002, Jones and Scholes received the written complaint from GBA employee Sabrina Smith, which stated that, on May 19, 2002, the Plaintiff came to her residence, ostensibly to get her to execute a uniforms order with respect to her GBA-duty uniform. She stated that (a) the Plaintiff came to the front door of her residence and

rang the doorbell at 9:30 p.m.; and (b) when she failed to answer the door, he peered into her patio window at a time when she was in a state of undress; and (3) she then observed him return to his car and sit therein, in the parking lot, for approximately three more hours; and (4) at midnight he returned to her front door and knocked. Smith alleged that the incident caused her to feel "very violated, and embarrassed to the point [she could] not look [Plaintiff] in the face, without feeling uncomfortable, and nervous to the extreme comparison of being

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raped and stalked."{See Footnote 4} Pl. Ex. 9 [Doc. 43]; Pl. Dep. pp. 127, 130, Ex. 13; Jones Aff. at ¶ 18, Ex. 14 ; Scholes Aff. at ¶ 6.

21. On the afternoon of May 21, 2002, Smith supplemented her complaint, stating that she did not know

why she did not attempt to contact the police at that time, even though the Plaintiff's actions allegedly "terrified [her] to the utmost."{See Footnote 5} Pl. Dep. pp. 127, 131-132, Ex. 14; Jones Aff. at ¶ 19, Ex. 15.

22. Based on what Jones allegedly believed to be the severity of Sabrina Smith's complaint against Bell, and her expressed fear,(See Footnote 6} Jones launched an internal investigation. Jones also immediately placed the Plaintiff on administrative leave with pay pending the outcome of his investigation. Pl. Ex. 9 [Doc. 43]; Pl. Dep. pp. 97, 105-108, Ex. 11; Jones Aff. at ¶ 20, Ex. 16; Scholes Aff. at ¶ 7, Ex. 3.

23. As a part of his investigation, Jones obtained a written statement from the Plaintiff. Pl. Dep. pp. 106, 133-134, Ex. 15.

{Footnote 4: The record is devoid of any evidence

that the Plaintiff, who apparently had an unblemished 20-year performance record, had ever had an altercation or even cross words with Smith. It should also be emphasized that Smith was apparently absent from work that day without permission}.

{Footnote 5: See FN 4.}

{Footnote 6: See FN 4.}

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24. In his statement, dated May 21, 2002, the Plaintiff acknowledged that he had, in fact, gone to Sabrina Smith's residence; that he had rung her front doorbell several times without any response, then walked around the residence to see if there were any lights on inside (i.e. whether anyone was home), and then returned to his car and waited in the parking lot for approximately three hours in an attempt to locate Smith and obtain her signature on the uniforms order

form.{See Footnote 7} Pl. Dep. pp. 133-134, Ex. 15; Jones Aff. at ¶ 21, Exs. 17, 18.

25. As a part of the investigation Jones conducted into Sabrina Smith's allegations, Jones also obtained two written statements from Sam Chiwetalu, as both the Plaintiff and Smith indicated that they had spoken to Chiwetalu about the incident. Pl. Dep. pp. 136-138, Exs. 16, 17; Jones Aff. at ¶ 22, Exs. 19, 20.

26. On May 29, 2002, Jones and Scholes met with Smith regarding her allegations against Plaintiff. At that time, Smith confirmed the events she had recounted in her written complaint regarding Plaintiff's visit to her

{Footnote 7: The Plaintiff alleged in his Complaint that he had gone to Smith's residence because she had been absent from work that day, without permission, and Jones had ordered him to get Smith's signature on the uniforms

form and then return it to him that same day [Doc. 1, p. 9] (emphasis supplied).}

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residence on the night of May 19, 2002, and she again expressed her fear of Plaintiff. {See Footnote 8} Jones Aff. at ¶ 23 ; Scholes Aff. at ¶ 8.

27. According to Jones he did not authorize the Plaintiff to go to Smith's residence. Jones Aff. at ¶ 24; Scholes Aff. at ¶ 9.

28. Because Jones and Scholes allegedly believed that Plaintiff's behavior was entirely unacceptable for a GBA employee, particularly in light of Smith's alleged fear and feelings of intimidation,{See Footnote 9} they determined that the Plaintiff should be terminated from employment. Jones Aff. at ¶ 25; Scholes Aff. at ¶ 10.

29. On May 31, 2002, Jones informed Plaintiff that he

was being terminated. Pl. Dep. pp. 54- 55, 97, 141-142, Exs. 3, 19; Jones Aff. at ¶ 26, Ex. 21; Scholes Aff. at ¶ 10, Ex. 4.

30. Neither Jones nor Scholes are aware of any GBA manager or employee, excluding the Plaintiff, who went to the residence of another employee at night in an attempt to contact the employee and made them feel fearful,

{Footnote 8: See FN 4.}

{Footnote 9: See FN 4. It should be emphasized that the Defendant did not deny that Jones ordered the Plaintiff to get Smith's signature on her uniforms form and return it to him that day. Nor did the Defendant deny that Smith was absent from work that day without permission or that the Plaintiff had never had any altercation with Smith or been accused of misconduct during his more than 20 years of service with the Defendant.}

intimidated, violated, uncomfortable, and embarrassed.{See Footnote 10} Danes Aff. at ¶ 27; Scholes Aff. at ¶ 11.

31. No one at GBA made comments to Plaintiff that he considered discriminatory or derogatory based on his race or gender. Pl. Dep. Pp. 147-152, 161-165.

II. Plaintiff' Statements of Disputed Material Facts {See Footnote 11}

1. On August 13, 2001, Plaintiff complained to Jones that the other Property Resource Managers were treating him disrespectfully in their daily interactions. Pl. Ex. 2, H/2, S/1 [Doc. 43]. {See Footnote 12}

2. On May 4, 2002, one of the officers (subordinates) on Plaintiff's shift, Palmer Strozier, damaged a state van he

was driving; Jones launched an investigation into the incident and ultimately disciplined Strozier. In an email note, dated May 7, 2002, thePlaintiff asked Jones for permission to view a video tape of the van on that day, so as to evaluate his subordinates

{Footnote 10: Id. See also FN 4. Smith's alleged reaction notwithstanding, the Defendant does not dispute that Jones instructed the Plaintiff to get Smith's signature on the uniforms order form and return it to him that day.}

{Footnote 11: In his response, the Plaintiff incorporated his Statement of Disputed Facts as a part of his Response to Defendant's Statement of Undisputed Facts. This Court has, however, separated them herein.}

{Footnote 12: This fact statement is taken from a combination of Plaintiff's Complaint [Doc. 1], Statement of Material Fact [Doc. 43, Att. 1], and the supporting evidence

thereof.}

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culpability. Plaintiff's Ex. 2, Att. S/1 [Doc. 43, Att. 5, p. 27]. Jones later suspended Strozier for three days over the incident. Id, Att. S/4 [p. 30].{See Footnote 13}

3. In an email dated May 18, 2002, the Plaintiff wrote to Jones appealing Strozier's three-day suspension and again asked Jones to show him the video tape so that Strozier might be "given the opportunity" to clear himself. Id.{See Footnote 14} The Plaintiff stated that his email reached Jones approximately on May 20, 2002, the date that Jones demoted him for the second time. Complaint [Doc. 1], p. 9.

4. Jones assigned the Plaintiff approximately 15 subordinates a day to supervise from Monday through Friday to cover the various security posts assigned to his

shift. Plaintiff considered that an inadequate number of officers to cover all of hist post assignments during the buildings' busiest times. In Plaintiff's opinion, Jones also assigned him an inadequate number of subordinate officers during the weekend shift. This shortage of subordinates from Monday through Friday prevented the Plaintiff from being able to use rotating weekday officers to cover his understaffed weekend posts. Pl. Ex. 2, Atts I/1, I/2, I/3, K/1, k/2; Pl. Dep. pp. 75-78.

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5. Indeed, Jones assigned five to seven more officers to Sowell's (i.e. a white male's) shift than to Plaintiff's shift, even though both Sowell and Plaintiff were on duty during the same time and each covered approximately the same number of posts as that of Plaintiff. Pl. Ex. 2, Atts. I/1, I/2, I/3, K/1, K/2, L at 3; Pl. Dep. pp. 75-78.

6. Jones also provided Sowell with two additional officers for posts that had already been closed down. Pl. Ex. 2, Att. C p. 3; Pl. Exs. 4, 5, 6, 7.

7. Plaintiff appealed his first demotion, allegedly for damaging a GBA vehicle while on probation, to Defendant. In his appeal, the Plaintiff argued that Jones never informed him that he was placing the Plaintiff on probation prior to the accident, and that Jones had been more lenient with one of Sowell's subordinates (i.e. only giving him a written reprimand for not following procedure after he was involved in a vehicle accident). Pl. Ex.. 1, at 1, Att. B at 2, Pl. Ex. 2.

8. The Plaintiff's employee files contains no information of any previous incident between Plaintiff and Smith. Indeed, Plaintiff's personnel file

reflects no entries during his 22 years of employment with GBA suggesting that he would behave inappropriately as alleged by Smith.

III. The Disputed Facts

1. Defendant contends that Brett Jones believed the Plaintiff had an adequate number of employees to cover his shift, and that any problems the Plaintiff had with coverage were the result of the Plaintiff's failure to properly schedule his subordinates. The Plaintiff contends that Jones did not regard the Plaintiff as having an adequate number of employees to cover his shift, as Jones had assigned five to seven more officers to Sowell's shift, which operated during the same time and covered the same number of posts as did the Plaintiff. Pl. Ex. 2, Atts. I/1, I/2, I/3, K/1, K/2, L at 3; Pl. Dep. pp. 75-78.

2. The Defendant claims that, although the template

Jones provided to the Plaintiff showed an assignment of 10 officers on Saturdays and nine officers on Sundays, the Plaintiff, in fact, only scheduled six officers on each weekend day. The Defendant further contends that this caused the

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Plaintiff's Lead Supervisors to complain to Jones that Plaintiff's assigned posts were insufficiently covered. Pl. Dep. pp. 77-78; Jones Aff. at ¶ 12, Exs. 8, 9. Plaintiff contends that the template provided for nine officers on Saturday and eight on Sunday. Pl. Ex. 2, Att. C p. 3; Pl. Exs. 4, 5, 6, 7.{See Footnote 15}

3. The Defendant contends that during a February 22, 2002 meeting, Brett Jones verbally placed Mike Sowell and Plaintiff on probation due to alleged inefficiencies he noted in their work performances. Jones informed them that he

was evaluating their job performances as Property Resource Managers, and gave them a brief overview of their expected job responsibilities and duties. Pl. Dep. pp. 48-49; Jones Aff. at 16, Ex. 1.

The Plaintiff contends that Jones did not, in fact, advise either the Plaintiff or Sowell that he was placing them on probation, nor did he otherwise advise them that he was personally evaluating their performances; Jones

{Footnote 15: Although the Plaintiff cites to the aforesaid exhibits to support his claim, this Court finds that the evidence cited does not address his contention or directly supports Defendant's account of the number of posts in the shift. See, e.g., Pl. Ex. 4.}

merely told them that if they were performing poorly they should stop doing so. Pl. Dep. pp. 50-51.

4. Defendant contends that on Monday, March 25, 2002, Brett Jones rescinded the demotion and, instead, verbally counseled Plaintiff about the damage he had caused to the vehicle. Pl. Dep. pp. 42, 44-47, 56-58, Ex . 4 ; Jones Aff. at ¶ 9, Exs. 3-4 ; Scholes Aff. at ¶ 5.

Plaintiff contends that Jones did not directly rescind the demotion, but that the Defendant required that the demotion be rescinded on the grounds that it had not been documented; indeed Scholes, not Jones, made the decision to rescind the demotion. Scholes Aff. at 5.

5. The Defendant contends that GBA did not reduce Plaintiff's salary or change Plaintiff's job duties as a result of the demotion rescinded on March 22, 2002. Pl. Dep. pp. 43-47.

Plaintiff contends that his job duties changed at the time he was demoted. Pl. Ex. 3.

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6. Defendant contends that during Plaintiff's 90-day probation period, Brett Jones observed that the Plaintiff failed to follow procedures for handling keys, which resulted in two keys being lost, and that he repeatedly had problems scheduling his subordinates, which regularly resulted in a lack of coverage on assigned posts during Plaintiff's shift. Jones Aff. at ¶ 11.

Plaintiff contends that he did, in fact, follow proper key procedures, and that he did not have any scheduling problems that led to a lack of coverage at assigned posts during his shifts.{See Footnote 16} Pl. Ex. 1, at 2, At. D;

Pl. Ex. 2, Att. C at 3-5 of 10; Pl. Exs. 6, 7.

7. Defendant contends that Mike Sowell is not a proper comparator because he did not exhibit similar problems in following the procedures for preventing lost keys and scheduling his subordinates during his 90-day probation period. Jones Aff. at ¶ 11.

Plaintiff contends that during the 90-day probation period, Sowell, in fact, also had similar problems to those alleged of Plaintiff during that same

{Footnote 16: This, of course, contradicts the Plaintiff's previous testimony.}

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period, to wit: Sowell failed to follow proper key procedures for handling keys, risking the possible loss of

such keys, and Sowell also had problems scheduling his subordinates. Pl. Dep. pp. 180-87; 199-201; Pl. Ex. 2, Att. C at 5-6 of 10.

8. Defendant contends that after the second key was lost during Plaintiff's shift, Jones questioned Plaintiff as to why the Plaintiff had not utilized the chit system, for tracking building keys, at the Archives Building (where Plaintiff was a supervisor). The Plaintiff replied that he had been advised that the chit system did not apply to the Archives Building's keys. Pl. Dep. pp. 54-55, 82-83, 86, Exs . 3, 9; Jones Aff. at ¶ 14.

Plaintiff contends that Jones merely advised him that he should have used the chit system at the Archives Building, prior to and during the second incident; he did not question Plaintiff about why the chit system was not in place (thereby suggesting Plaintiff was remiss in failing to

use the system at the building). Pl. Ex. 1 at 21 Pl. Dep. pp. 82-83.

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9. The Defendant claims that Jones informed Plaintiff that the chit system for handling keys was effective everywhere in the Property Resources Division, and Jones directed the Plaintiff to put the chit system in place at the Archives Building. However, the Plaintiff failed to comply with Jones's directive. Jones Aff. at ¶ 14.

The Plaintiff contends that Jones never directed him to enact a chit system for the keys to the Archives Building. Pl. Ex. 1 at 2; Pl. Dep. 82-83.

10. The Defendant maintains that, throughout his employment, the Plaintiff never complained to GBA officials claiming that he had been discriminated against by

superior or fellow employees based on his race or gender, or that any such people retaliated against him. Pl. Dep. pp. 210-215, 224; Jones Aff. at ¶ 28.

The Plaintiff maintains that, in fact, he made several internal complaints to GBA claiming that his supervisor discriminated against him based on his race and that Defendant retaliated against him for opposing an unlawful

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employment practice. Pl. Ex. 1, Att. B at 2-4 of 5; Pl. Ex. 2 at 3-4 of 10; Att. L, S/1, S/2, S/3, S/4.

Part Four: Conclusions of Law

I. The Standard for Review

Pursuant to Fed. R. Civ. P. 56(c)), this Court must

grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As the moving parties, the Defendants have the burden of showing the absence of a genuine issue as to any material fact. This Court must view any materials submitted in favor of the motion in the light most favorable to the nonmoving party (here the Plaintiff). Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed.2d 142 (1970); Knight v. Baptist Hospital Hosp. Of Miami, Inc., 330 F.3d 313 (11th Cir. 2003); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991).

If the movant makes such a showing, the burden shifts to the non-moving party to show the presence of a

disputed material fact. The non-moving party

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cannot create a disputed issue of fact by his pleadings, but rather must file a response which includes, or at least refers to, affidavits, declarations, depositions, or similar credible evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 439 (11th Cir. 1996); Worsham v. Provident Companies, Inc., 249 F.Supp.2d 1325, 1330 (N.D. Ga. 2002).

In assessing whether there exists a genuine issue of material fact, this Court is not authorized to weigh the relevant evidence and make credibility determinations. Stewart v. Booker T. Washington Ins., 232 F.3d 844, 850 (11th Cir. 2000); McKenzie v. Davenport-Harris Funeral

Homes, 834 F.2d 930, 934 (11th Cir. 1987). "The mere existence of some factual dispute will not defeat summary-judgment unless that factual dispute is material to an issue affecting the outcome of the case." Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995) (citing Anderson, 477 U.S. at 247-49); Isenbergh, 97 F.3d at 440-44; Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir. 1989). Instead, a genuine issue of material fact exists only if there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict in his favor. Anderson, 477 U.S. at

248; Chapman v. AI Transport, 229 F.3d 1012, 1023 (11th Cir. 2000); Thornton v. E.I. Du Pont De Nemours and Co., 22 F.3d 284, 288 (11th Cir. 1994).

Where the legal issue is one on which the movant

would bear the ultimate burden of proof at trial, the movant must show

> affirmatively the absence of a genuine issue of material fact: it must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial. In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party. If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the non-moving party, in response, come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting United States v. Four Parcels of Real

Property, 941 F.2d 1428, 1438 (11th Cir. 1991)). Mere conclusory allegations and assertions are insufficient to create a disputed issue of

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material fact. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). This Court will use these gauges to measure whether the Defendants are entitled to summary judgment as a matter of law.

II. The Plaintiff cannot make out a prima facie case of disparate treatment, with respect to the treatment and assignment of officers on his shift.

Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Here, the Plaintiff alleges that the Defendant discriminated against him because he is an African-American.

The Plaintiff bears the initial burden of establishing a prima facie case of discrimination Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); Pace v. Southern Ry. Sys., 701 F.2d 1383 (11th Cir. 1983). The Plaintiff is not obligated to prove his prima facie case under one rigid standard, but he is required to present some admissible evidence from which a finder of fact could conclude that he was discriminated against because of his race. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715,

103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983). A plaintiff may establish a prima facie case of unlawful employment discrimination using either direct or circumstantial evidence of discrimination. McDonnell Douglas, 411 U.S. at 802; Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). Here, the Plaintiff has not presented any direct evidence of discrimination. Thus, he must make out a prima facie case via circumstantial evidence.

As previously noted, the Plaintiff has alleged that the Defendant discriminated against him because of his race by, inter alia: (1) under-staffing his shift (assigning an insufficient number of officers during evening hours); (2) suspending an officer, who was assigned to Plaintiff's shift, for three days; (3) terminating Plaintiff's employment.

1. Plaintiff cannot show an adverse employment action with respect to the

assignment and suspension.

It is well-settled that in order to establish a prima facie case of race discrimination under Title VII, a Plaintiff must show that (1) he belongs to a protected class; (2) he was subjected to [an] adverse job action; (3) his employer treated similarly situated employees outside his class more favorably; and (4) he was qualified to do the job. Holifield v. Reno, 115 F.3d at 1561-62; Hall v. Alabama Ass'n of School Boards, 326 F.3d 1157, 1166 (11th Cir. 2003).

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The Plaintiff alleges that the Defendant subjected him to adverse employment actions, while not subjecting a similarly situated white co-worker, Howard Sowell, to any such actions. First, Plaintiff claims that the shift he

supervised required as many officers assigned as that of Sowell, even though Sowell's daytime shift covered a busier time than Plaintiff's own evening shift. Nevertheless, the Plaintiff maintains, the Defendant assigned an insufficient number of officers to Plaintiff's shift and a greater number to Sowell's shift, even taking into account that, as Plaintiff describes, "the day shift had more activity" [Doc. 43, At. 1, p. 8]. Second, Plaintiff claims that the Defendant suspended an officer on his shift for three days following a vehicle accident but did not penalize an employee on Sowell's shift after she was accused of an equally severe offense (allegedly sleeping on the job). Complaint [Doc. 1], p. 8.{See Footnote 17} The Defendant contends that these acts, by themselves, do not rise to the level of adverse employment actions, which the Plaintiff must show to make out his prima facie case of discrimination.

The Eleventh Circuit has "never adopted a bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged

{Footnote 17: This Court need not consider this alleged instance of disparate treatment as the Plaintiff has failed to set it out in his Response to the Defendant's Motion for Summary Judgment.}

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discrimination must have for it to be actionable; nor would such a rigid test be proper." Davis v. Town of Park Lake, Florida, 245 F.3d 1232, 1239 (11th Cir. 2001) (collecting cases) (quoting 42 U.S.C. § 2000e-2(a)). It has, however, established that not all conduct by an employer that negatively affects an employee constitutes adverse employment actions. Id.; Gupta v. Florida Bd. of Regents,

212 F.3d 571, 581 (11th Cir. 2000); Williams v. Bristol-Meyers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (noting that not everything that makes an employee unhappy is an actionable adverse action, otherwise, "every trivial personnel decision that an irritable . . . employee did not like would form the basis of a discrimination suit"). As this Circuit has repeatedly noted, "Title VII is neither a general civility code nor a statute making actionable the ordinary tribulations of the workplace." Davis, 245 F.3d at 1239 (citations and quotations omitted).

Although Title VII does not require proof of direct economic consequences, for purposes of showing an adverse employment action, the alleged impact on an employee must be more than speculative, causing a tangible adverse effect on a plaintiff's employment. Id.; Doe v. DeKalb County Sch. Dist., 145 F.3d 1441, 1449 (11th Cir. 1998). Specifically, the act must cause the employee

"tangible harm, such as loss of salary, benefits, or position." Wu v. Thomas, 996 F.2d 271, 273 (11th Cir. 1993).

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In the instant case, it is undisputed that the Defendant did not subject the Plaintiff to a reduction in salary, loss of benefits, denial of promotion, workplace reassignment, transfer, or change in permanent job title as a result of the two employment actions he cites. Id. The Plaintiff has not even attempted to demonstrate that the acts he cites affected, in any other respect, "the terms, conditions, or privileges of his employment," much less that they had a "serious and material" impact on such terms and conditions. Id. The Plaintiff simply has not addressed Defendant's claim that these acts do not constitute adverse employment actions as to the Plaintiff.

In short, this Court is compelled to conclude that the scheduling problems that may have resulted from Defendant's assignment of officers to shifts do not create credible reasons for disciplining the Plaintiff and so are not, in themselves, adverse employment actions (this is in marked contrast to Defendant's disproportionate disciplinary responses to the alleged "scheduling problems," which this Court concludes did, in fact, constitute adverse actions). Therefore, this Court is compelled to conclude that the Plaintiff cannot make out a prima facie case of race-based discrimination with respect to the conditions he cites.

III. The Plaintiff can make out a prima facie case of disparate treatment under Title VII with respect to his second demotion.

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The Plaintiff claims that Jones demoted him (approximately three months after his first attempt to demote the Plaintiff was reversed) on May 20, 2002, purportedly in response to performance problems which (a) the Plaintiff did not, in fact have, or (b) which were shared or comparable to those exhibited by his similarly situated white comparator, Sowell. Yet the latter, who was outside the Plaintiff's protected class, was not demoted. Defendant challenges only one element of Plaintiff's prima facie case regarding his demotion{See Footnote 18}: Defendant claims that the demotion was not an adverse employment action [Doc. 38. At. 1, pp. 6-8].

This Court disagrees.

Unlike a difference in the number of officers assigned, or the disciplining of differently situated subordinates, a demotion is generally in every sense "an ultimate employment decision," which "adversely affects . .

. [his] status as an employee.'" Gupta, 212 F.3d at 587 (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (11th Cir. 1997). Although this Court agrees with Defendant that

{Footnote 18: This Court therefore (and independently) concludes that the remaining elements of the Plaintiff's prima facie case with respect to his demotion remain unchallenged: to wit, that he (a) is a member of a protected class (African American); (b) was qualified for the job he held before the alleged discriminatory act took place; and (c) was treated less favorably than a similarly situated comparator not in the protected class, i.e. who is white. In the instant case, Plaintiff cites to undisputed facts showing that he and Sowell had similar jobs and that Plaintiff performed those duties no less competently than Sowell, specifically in that he was not at fault for any of the acts of alleged incompetence that Defendant cites, which

purportedly distinguish him from Sowell (specifically, he was not at fault for the alleged poor scheduling or the loss of keys). Yet Sowell was not demoted.}

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Jones's May 20th demotion had not yet affected other significant terms of Plaintiff's employment, such as compensation and working conditions, that is insufficient to disqualify the demotion as an adverse employment action. It is established in the Eleventh Circuit and elsewhere that a demotion, which amounts to a loss of prior position and status, is in itself an adverse employment action. Wu, 996 F.2d at 273; Rodriguez v. Board of Education, 620 F. 2d 362, 364-66 (2d Cir. 1980) (junior high school teacher demoted to elementary school teacher suffered adverse action because her new duties were beneath her expertise); Goodwin v. Circuit Court, 729 F.2d 541, 550 (8th Cir.

1984) (re-appointment from juvenile court hearing officer to assistant prosecuting attorney is adverse employment action because the employee's new post required less experience). Plaintiff's demotion undisputably constituted a setback in his career that involves a loss of status and position, regardless of whether it resulted in additional harm; consequently, it was an adverse employment action. This Court is therefore compelled to conclude that the Plaintiff can make out a prima facie case of disparate treatment based on his race, in violation of Title VII, with respect to his May 20, 2002 demotion.

IV. There is a genuine issue of fact as to whether Defendant's reasons for demoting the Plaintiff were pretextual.

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Even if a Plaintiff has established a prima facie case, that "does not[,] in and of itself[,] foreclose the possibility of summary judgment being granted in favor of the employer." Young v. General Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988). The Plaintiff must also respond to any claim on the part of the Defendant that it had a legitimate non-discriminatory reason for taking the adverse employment action. Id; Chapman v. Al Transport, 229 F.3d 1012, 1024-26 (11th Cir. 2000) (en banc); Grigsby v. Reynolds Metals Co., 821 F.2d 590, 596 (11th Cir. 1987). Once the Defendant proffers sufficiently probative, credible, non-discriminatory reasons for its actions, then the Plaintiff must come forward with specific evidence demonstrating that the reason or reasons given by the Defendant were pretexts for discrimination, or that he can show a disputed material fact with respect thereto. Grigsby, 821 F.2d at 596 (11th Cir. 1987).

In the instant case, Jones's legitimate non-discriminatory reason (LNDR) for attempting to demote the Plaintiff was the Plaintiff's alleged performance problems. Specifically, the Defendant contends that the Plaintiff repeatedly failed to schedule a sufficient number of officers to cover the weekend posts on his shift. Following these observations, Jones placed the Plaintiff on probation for 90 days, during which, the Defendant contends, the Plaintiff continued to have scheduling

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problems. In addition, Jones noted that during the Plaintiff's 90-day probation period, two keys for the state archives building were apparently lost during Plaintiff's shift. Moreover, the Defendant also alleges that the keys were lost, at least in part, because the Plaintiff had failed to follow Jones's instruction to implement a "chit" system,

which Defendant had instituted to prevent the loss of keys.

It is well-established that even when a Defendant has proffered a legitimate non-discriminatory reason for its actions, a Plaintiff can still preclude summary judgment, either by (a) citing facts that could show discriminatory intent underlying the Defendant's proffered reasons or (b) showing that a reasonable juror could find the Defendant's proffered reasons unworthy of belief, thereby supporting the inference that they were pretexts for discrimination. As the Supreme Court stated: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113

S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993) [emphasis in original]. Although the Hicks decision addressed

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factfinders at trial, the Eleventh Circuit has applied the standard to summary judgment:

> [I]t follows from Hicks that a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if [the Plaintiff presents] sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action.

Combs v. Plantation Patterns, 106 F.3d 1519, 1529 (11th Cir. 1997). A Plaintiff can meet this burden by "producing sufficient evidence to allow a reasonable finder of fact to conclude that the defendant's articulated reasons for its decision are not believable." Howard v. BP Oil Co., Inc., 32

F.3d 520, 526 (11th Cir. 1994) (factual dispute as to the truth of petroleum distributor's articulated reasons for granting gas station dealerships to white and not black applicants precluded summary judgment).

In the instant case, the Plaintiff has met his burden of showing a genuine issue of material fact as to whether Defendant's claimed reasons for trying to demote the Plaintiff were false and therefore pretextual. Although the Plaintiff does not deny the factual content of Defendant's claimed reasons, this Court is compelled to conclude that the Plaintiff has raised significant doubt as to their

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veracity. The Defendant has cited as one of its reasons for terminating the Plaintiff: a) that he failed to schedule a sufficient number of officers to cover weekend posts [Id, Response to FOF 18, p. 8-9]; and b) that his "lead

supervisors" on his shift complained to Jones about Plaintiff's poor scheduling. Response to FOF 20 Id., p. 10. In response to this allegation, the Plaintiff has presented evidence that any problem he had in scheduling sufficient officers to cover all posts were caused by the Defendant's failure to assign enough officers to his shift. The Defendant neither denies nor refutes the Plaintiff's evidence that he had complained to Jones about this shortfall. Defendant admits that it assigned more officers to Sowell's shift than to Plaintiff's, ostensibly because Sowell's day shift required more officers than Plaintiff's evening shift. Defendant's FOF 19. However, Defendant fails to address Plaintiff's claim that his (fewer) officers were also assigned to cover the same number of posts as Sowell's officers, even though Jones had assigned fewer officers to his shift. Id.

With respect to losing the building keys, the Plaintiff has presented evidence that no supervisor,

including Jones, ever instructed him to implement the "chit system" at the archives building to prevent key loss. In other words, the Plaintiff claims that he was never directed to implement the chit system for the archives building – one of the Defendant's purported reasons for demoting the Plaintiff. In

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short, the Plaintiff contends he was unaware of the instruction that the Defendant accused him of violating. Again, the Defendant has failed to address, much less refute, the Plaintiff's evidence discrediting the defendant's proffered reasons for demoting him. As a result, the Plaintiff has raised factual issues regarding his demotion "sufficient to create a genuine factual issue with respect to the truthfulness of the defendant's proffered explanation." Howard, 32 F.3d at 525. Consequently, following Hicks,

Howard and Combs, this Court is compelled to conclude that there is a factual question for a jury as to whether Plaintiff's demotion was a pretext for racial discrimination.

V. The Plaintiff has created a genuine issue of fact as to whether Defendant's reasons for terminating the Plaintiff were pretextual.

The Defendant assumes, for the purposes of its summary judgment motion, that the Plaintiff can make out a prima facie case of race discrimination with respect to his termination. Defendant's Brief [Doc. 38, At. 2], p. 6. This Court will make the same assumption.{See Footnote 19} Nevertheless, the Defendant contends it had a legitimate non-discriminatory reason for terminating the Plaintiff: the Plaintiff's alleged stalking of a co-worker, Sabrina Smith ("The Plaintiff's unacceptable

{Footnote 19: This Court accordingly infers that the

Plaintiff: (1) is a member of a protected class; (2) was qualified for his job a Property Resource Manager; (3) was subjected to an adverse employment action (to wit, he was terminated); and (4) was either replaced by someone outside his class or treated less favorably than a similarly situated comparator outside his protected class.}

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behavior on the night of May 19th, 2002, prompted his termination." Defendant's Brief [Doc. 38, p.9]).

In response, the Plaintiff maintains that on the aforesaid evening, he was, in effect, required by Jones to go to Smith's residence merely in order to obtain Smith's signature on an order form for work-related uniforms, and that Jones had instructed the Plaintiff to return the completed form to him that same day. Plaintiff's Complaint, Case Summary [Doc. 1], p. 9-11. With Smith

home from work, the Plaintiff's only recourse to obtain her signature on the form and return it to Jones was to seek her at her residence. In connection therewith, he rang the doorbell and got no answer. Plaintiff then attempted to look inside to ascertain whether Smith, who did not have permission to miss work, was present inside the residence. Moreover, the Plaintiff has also shown that in his record of more than two decades of employment with Defendant, he has never been accused of misconduct, including any intimidating behavior, whether towards Smith or others. Therefore, Plaintiff maintains, Smith had no reason to fear him, much less regard his one-time visit to her home as comparable to "being raped." In other words, the Plaintiff's evidence suggests that Smith's fears were, more likely than not, based on her concern over being found out by a supervisor for skipping work.

The Defendant has neither denied or refuted Plaintiff's explanation for his visit, including the reasons he believed he was obliged to do so immediately. Similarly, the Defendant does not dispute Plaintiff's claims discrediting Smith's reaction as entirely unwarranted. The Plaintiff's unchallenged assertions, then, cast significant doubt as to whether Defendant could have regarded his isolated, harmless and ultimately justifiable visit to Smith's residence as grounds to terminate, or even discipline, the Plaintiff. That doubt is sufficient to create a genuine factual issue regarding the truthfulness of the Defendant's proffered reason (LNDR). Howard, 32 F.3d at 525. This Court is therefore compelled to conclude that the Plaintiff has created a disputed material issue of fact as to whether the Defendant's LNDR for terminating him was a pretext for discrimination. Consequently, the Defendant's Motion

for Summary Judgment on this ground must be denied and a trial conducted thereon.

VI. The Plaintiff cannot make out a prima facie case of retaliation with respect to his demotion.

The Plaintiff contends that the Defendant retaliated against him by demoting him after he had complained to his supervisor, Brett Jones, about Jones's alleged discriminatory practices. It is well-settled that Title VII makes it unlawful for an employer to retaliate against an employee for having, inter alia, "opposed

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any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). This provision of Title VII, known as the "opposition clause," protects employees "who informally voice complaints to their superiors or who use their employers' internal grievance

procedures" regarding a practice prohibited by Title VII. Rollins v. Fla. Dep't of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989).

To make out a prima facie case of retaliation under the "opposition clause" of Title VII, the Plaintiff must show that: (1) he participated in activity protected by Title VI, i.e. he opposed a discriminatory employment practice made unlawful by Title VII; (2) he suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1201 (11th Cir. 2001); Morgan v. City of Jasper, 959 F.2d 1542, 1547 (11th Cir. 1992); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1521 (11th Cir. 1991).

An employee who seeks protection under Title VII for opposing an employment practice must establish that he had "a good faith, reasonable belief" that his employer

engaged in unlawful discrimination. Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997); Clover v. Total System Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999). "This standard involves both a

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subjective and objective component." Gaddis v. Russell Corp., 242 F.Supp.2d 1123, 1142-43. In other words, a plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. Little, 103 F.3d at 960.

In the instant case, the Plaintiff's two complaints to Jones prior to his May 20th demotion do not meet this standard; they simply do not raise claims of discrimination, much less any possibly cognizable claims. First, in a letter

dated August 13, 2001, the Plaintiff complained that his colleagues showed disrespect for him in their day-to-day interactions. He did not mention race or any tangible employment action in this complaint. Second, Plaintiff wrote two emails to Jones in May, 2002, on behalf of a subordinate on Plaintiff's shift who had been disciplined by Jones for his involvement in a vehicle accident. Pl. Ex. 2, H/2, S/1 [Doc. 43]. The second note, dated May 20, 2002, reached Defendant on the same day as the demotion. Yet these emails could scarcely be considered "opposition" within the meaning of Title VII; no decision on Defendant's part or Jones's part is criticized in any way. Rather, in the first email [Ex. 1, H/2], Plaintiff merely requested that the officer on his shift be treated no worse than Sowell's equally culpable subordinate in any proceedings regarding the accident [Pl. Ex. 2, At.

S/2]. Next, Plaintiff wrote Jones asking him to give the Plaintiff an opportunity to view a video tape of the alleged accident, again declining to criticize or evaluate any action, policy or intent on the part of Jones or Defendant generally. The Plaintiff neither discussed nor alluded to race and discrimination in his communications with Jones.

In short, the Plaintiff failed to show that the actions of which he had complained were "sufficiently close enough to judicially cognizable discriminatory conduct to warrant a finding that the Plaintiff's belief was objectively reasonable." Gaddis, 242 F.Supp.2d, at 1143. As a result, this Court is compelled to conclude that Defendant's demotion of the Plaintiff does not constitute retaliation under Title VII and that the Plaintiff's Retaliation claim cannot withstand summary judgment.

VII. The Plaintiff can make out a prima facie case of

Retaliation with respect to his post-termination treatment by Defendant.

The Plaintiff contends that after he was terminated and he filed discrimination charges with the EEOC, the Defendant falsely maligned his employment record therefor to his potential employers, costing Plaintiff a new job. Complaint [Doc. 1, p. 9]. Ordinarily, this allegation, without more, would be insufficient to survive a motion for summary judgment on the claim. Fed. R. Civ.

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P. 56(e); Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997). Rather, the Plaintiff would have to challenge the motion citing to affidavits, declarations, depositions, or comparable evidence showing that there is a genuine issue for trial. Id.

In the instant case, however, the Defendant has

failed to address Plaintiff's second charge of retaliation in its motion for summary judgment. Instead, Defendant treats Plaintiff's claim as a state tort defamation claim. This Court is compelled to conclude that the Defendant has misread the Plaintiff's complaint. In his supporting "case summary," the Plaintiff's Complaint states in pertinent part that:

> Charging Party alleges that Respondent's representative have been providing false and defamatory information to outside sources, in retaliation for his filing the charge of discrimination against Respondent with the United States Equal Employment Opportunity Commission, thus, preventing him from securing gainful employment. According to Charging Party, a position that he was offered was rescinded because of the hiring official's concerns regarding the "stalking" accusation.

Plaintiff's Complaint [Doc. 1], p. 9 (emphasis added). Furthermore, the Plaintiff clearly distinguishes his complaint of retaliation from any state tort claims, by

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adding thereafter that "he will also pursue any applicable state law claims in this regard."

It follows from Plaintiff's plain language, then, that the Plaintiff has raised a Title VII federal claim alleging Retaliation for engaging in activity protected by Title VII, namely filing discrimination charges with the EEOC. After carefully reviewing Defendant's pleadings, this Court is compelled to conclude that the Defendant has not responded to this claim of Plaintiff's, and, therefore, has not moved for summary judgment thereon. As a result, summary judgment cannot be granted, nor even considered, and a trial must be had thereon.

VIII. The Plaintiff has abandoned his sex-discrimination claim.

Finally, the Plaintiff also contends that the Defendant discriminated against him because of his gender (male) in violation of Title VII. In support of this allegation, Plaintiff notes that the Defendant allegedly interpreted his visit to Smith's apartment as a form of "sexual harassment." Plaintiff's Statement of Disputed Facts [Doc. 43, At. 1], p. 18. He further notes that GBA Executive Helen Scholes, who participated in the decision to terminate Plaintiff, "was bias and severe when it came to matters involving sexual harassment, and according to her policy, an employee would be presumably terminated for violating any of the wide range of acts involving sexual harassment." Id. As a result of Scholes's allegedly

biased interpretation, Plaintiff concludes, "sex ... played a part" in Defendant's decision to terminate Plaintiff.

Unlike Plaintiff's second retaliation claim, the Defendant responded, albeit generally, to Plaintiff's gender-discrimination claim, arguing that "nothing in the record" supports such a claim [Doc. 38, pp. 1, 4-5]. This Court is compelled to agree. It is well settled that in order for an employee to make out a prima facie case of sex-based discrimination, a Plaintiff must include the element that the employer took an adverse action against the employee because of his or her gender. Oncale v. Sundowner Offshores Servs., Inc., 523 U.S. 75, 80, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201 (1998). Instances of harassment, disparate treatments, or complaints thereof, fall decidedly outside the rubric of Title VII protection if they are not arguably gender-related. Succar v. Dade County School Bd., 229 F. 3d 1343, 1345 (11th Cir. 2000) (harassment by

a former lover is not actionable sexual harassment without an overt connection to gender).

A. Plaintiff cannot make out a prima facie case of sexual harassment.

In order to show that his employer's conduct constituted actionable sex-based harassment under Title VII, a plaintiff must show that "but for the fact of [his] sex," the conduct would not have occurred. Mendoza v. Borden, Inc., 195 F.3d 1238, 1248 n.5 (11th Cir. 1999).

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In the instant case, the Plaintiff does not dispute that Defendant's proffered reason for terminating him is his alleged stalking of a female employee at her home, which allegedly intimidated her. Nor does Plaintiff deny that Smith complained about his action to Defendant in extreme terms. These allegations, as this Court reads them, are

gender-neutral, and the Defendant might have, as conceivably, raised them about a female employee who allegedly stalked another female employee. As a result, this Court is compelled to conclude that the Plaintiff has failed to satisfy the essential element of a prima facie sexual harassment case, namely that his gender was the reason for the Defendant's adverse employment action (i.e. for terminating the Plaintiff).

B. Plaintiff has failed to make out a prima facie case of sex-based disparate treatment under Title VII.

As with race-based discrimination, a Plaintiff seeking recovery under Title VII for disparate treatment due to his gender (sex) must first show that (a) he was a member of a protected class (male); (b) he was subjected to an adverse employment action; and (c) a similarly situated person outside of his protected class (i.e. females) received more favorable treatment. Anderson v. WBMG-42, 253

F.3d 561, 564 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997). The third element (c), supra, requires that Plaintiff cite a female

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comparator who was treated more favorably than was he. The Plaintiff has failed to offer any such evidence. More importantly, Plaintiff has failed to respond to Defendant's Motion for Summary Judgment alleging that the Plaintiff cannot make out a prima facie case of sex-based discrimination. The Plaintiff's failure to respond to this issue compels this Court to deem the Plaintiff's sex discrimination claim abandoned. Snyder v. Time Warner, Inc., 179 F.Supp.2d 1374, 1385 (N.D.Ga. 2001) (finding that plaintiff's failure to respond to defendant's arguments regarding the propriety of attorneys fees and punitive damages constituted abandonment of those claims) Marion

v. DeKalb County, 821 F. Supp. 685, 689 n. 4 (N.D.Ga. 1993) (finding that plaintiff's failure to respond to defendant's argument of sovereign immunity constituted an abandonment of that claim). See also LR 7.1, N.D. Ga.

In any event, this Court is compelled to conclude that Plaintiff's gender discrimination claim is without merit. In short, this Court has found that Plaintiff has failed to present any evidence sufficient to make out a prima facie case of: (1) Title VII discrimination with respect to Jones's assignment and treatment of the Plaintiff's subordinates; (2) Retaliation with respect to his demotion; or (3) sex discrimination with respect to his termination. Nevertheless, this Court has also found that the Plaintiff can make out a prima facie case of race-based

discrimination with respect to his demotion and Retaliation regarding his posttermination job hunt. Additionally, this Court has concluded that the Plaintiff can raise a genuine factual issue as to whether Defendant's LNDR for terminating the Plaintiff was a pretext for discrimination.

Part Five: Conclusion

IT IS THEREFORE RECOMMENDED that Defendant Georgia Building Authority's Motion for Summary Judgment [Doc. 38] be GRANTED in part and DENIED in part. Specifically, IT IS RECOMMENDED that Defendant's Motion for Summary Judgment be GRANTED as to (1) Plaintiff Daniel Bell's race-based Title VII discrimination claim regarding the Defendant's treatment and assignment of Plaintiff's subordinates; (2) Plaintiff's Title VII retaliation claim with respect to his demotion ; and (3) Plaintiff's gender-discrimination claim, and DENIED as to (1) Plaintiff's race-based discrimination

claim with respect to his May 20, 2002 demotion; and (2) Plaintiff's race-based discrimination claim with respect to his termination; and (3) Plaintiff's retaliation claim with respect to his posttermination job search.

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Assuming the District Court adopts this Report and Recommendation, the parties shall file their consolidated pretrial order in accordance with LR 16.4 N.D. Ga. and contact this Court to schedule a trial on the foregoing counts.

The Clerk of Court is DIRECTED to terminate referral of this action to the undersigned.

IT IS SO RECOMMENDED AND ORDERED.

This 8th day of July, 2005.

S/JOEL M. FELDMAN

JOEL M. FELDMAN

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANIEL L. BELL,

Plaintiff,

v.

GEORGIA BUILDING AUTHORITY,

Defendant.

CASE NO.: 1:03-CV-02384-WBH

ORDER

This employment discrimination case is before the Court on Defendant's Motion for Summary Judgment [38]. Plaintiff, an African-American male employed by the Georgia Building Authority and proceeding pro se, filed this case alleging that Defendant discriminated and retaliated against him because of his race and gender in violation of

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq.

The Magistrate Judge's Report and Recommendation [46] recommends that Defendant's Motion for Summary Judgment be granted in part and denied in part . Because Defendant filed objections [48] to the report and recommendation, the Court must carefully consider these objections and conduct a de novo review of this action with respect to those objections. See Nettles v. Wainwright, 677 F.2d 404, 409 (5th Cir. Unit B 1982).

After conducting a de novo review of the record before it in light of Defendant's objections the Court disagrees with certain portions of the report and recommendation, as set forth more fully below.

ANALYSIS

The Magistrate Judge recommends granting Defendant's motion for summary judgment with respect to all claims except for: (1) Plaintiff's disparate treatment claim concerning Plaintiff's May 20, 2002 demotion; (3) Plaintiff's discriminatory termination claim; and (3) Plaintiffs retaliation claim concerning Defendant's post-termination treatment.

With respect to the portions of the report and recommendation to which the parties do not object, the Court must conduct a plain error review of the record. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S. Ct. 729, 79 L. Ed.2d. 189 (1984). After careful review, the Court finds no plain error in the Magistrate Judge's factual or legal conclusions and therefore ADOPTS AS ITS ORDER the portions of the report and recommendation to which no objections have been raised.

Defendant does, however, object to the Magistrate Judge's recommendations concerning the three remaining claims stated above and argues that: (1) Plaintiff cannot establish a prima facie case of disparate treatment with respect to his May 20, 2002 demotion; (2) Plaintiff cannot establish that Defendant's reasons for demoting Plaintiff on May 20, 2002 are pretextual; (3) Plaintiff cannot establish that Defendant's reasons for terminating Plaintiff are pretextual; and (4) Plaintiff cannot establish a prima facie case of retaliation with respect to his post-termination treatment by Defendant. The Court addresses these objections in turn.

May 20, 2002 Demotion

Defendant argues that Plaintiff cannot establish a prima facie case of discriminatory

demotion because he cannot demonstrate that he suffered an adverse employment action under the particular facts of this case. The Court agrees. Defendant, through its Director, Mr. Jones, notified Plaintiff on May 20, 2002 that he was being demoted from the position of Property Resource Manager to a Property Resource Officer 2, with a corresponding pay reduction that would take effect on June 1, 2002. Dep. Bell [37], Ex. 10. Plaintiff testified that he continued performing his managerial duties that day until Mr. Cardell, another manager, arrived on duty early that evening, at which point Defendant relieved Plaintiff of his responsibilities as manager. The next morning, May 21, 2002, Plaintiff arrived at work and clocked in, after which Defendant placed Plaintiff on administrative leave with pay{See Footnote 1} due to an internal investigation launched in connection with an employee complaint about

Plaintiff unrelated to the demotion. Consequently, with the exception of a few hours on May 20, 2002, Plaintiff did not work in the position of Property Resource Officer 2, nor did he suffer a salary reduction.{See Footnote 2}

To rise the level of an actionable Title VII claim, employment decisions must work a material alteration on the terms of employment, as opposed to being merely trivial annoyances. See Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir . 2001) ("Whatever the benchmark, it is clear that to support a claim under Title VII's anti-discrimination clause the employer's action must impact the 'terms, conditions, or

{Footnote 1: While on administrative leave, Plaintiff received his Property Resource Manager salary, as the pay reduction did not take effect until June 1, 2002.}

{Footnote 2: As explained more fully below,

Defendant terminated Plaintiff due to the outcome of the internal investigation regarding an incident unrelated to his demotion on May 31, 2002. Dep. Bell [37], Ex. 19.}

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privileges' of the plaintiff's job in a real and demonstrable way"); accord Gawley v. Indiana Univ., 276 F.3d 301, 314 (7th Cir. 2001); see also Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016-17 (8th Cir. 1999) ("Minor changes in duties or working conditions that cause no materially significant disadvantage do not meet the standard of an adverse employment action"). Under the particular facts of this case, the Court finds that Plaintiff cannot make out a prima facie case of discriminatory demotion because he cannot establish an adverse tangible employment action. While Defendant notified Plaintiff of his demotion on May 20, 2002, and perhaps began the process of changing his

responsibilities at the end of his shift on that day, Plaintiff suffered no change in pay or benefits, nor did his responsibilities change substantially, because Defendant placed Plaintiff on administrative leave the morning following the demotion due to an unrelated incident. Consequently, the record does not support the conclusion that Plaintiff suffered from an employment decision that amounted to "a **significant** change in employment status." Burlington Indus., Inc. v. Ellerth 524 U.S. 742, 761 (1998)(explaining further that in most cases, "[a] tangible employment action...inflicts direct economic harm.")(emphasis added). Therefore, Plaintiff has not established a prima facie case of discriminatory demotion and Defendant's motion for summary judgment on this claim is GRANTED.

Termination

Defendant concedes that Plaintiff has established a

prima facie case of discriminatory termination. Defendant's legitimate non-discriminatory reason for terminating Plaintiff is that he went to a subordinate's residence during off-duty hours and waited at her house for

approximately three hours in an attempt to make contact with the employee.

Plaintiff contends that he had no choice about going to Sabrina Smith's residence to obtain her signature on a "uniform order form," because Mr. Jones, Plaintiff's supervisor, instructed Plaintiff to return the signed form by Monday and Ms. Smith did not report for work on Sunday. Plaintiff's own deposition testimony refutes this contention, however, and the Court finds that Plaintiff has not established that Defendant's reason for terminating Plaintiff is a pretext for discrimination.

According to Plaintiff, Mr. Jones ordered him and other Property Resource Managers to obtain employees' signatures on particular forms dealing with uniform purchases for employees. Mr. Jones sent Plaintiff and other Property Resource Managers a memo dated May 9, 2002 outlining this assignment and providing the managers with a deadline of Friday, May 17, 2002 to return the signed forms to Mr. Jones. See Dep. Bell [37] at 113-114 & Ex.12. Plaintiff then instructed one of his subordinates to collect the signatures. Id. at 114. Plaintiff admits that he failed to follow up on this delegation of responsibility until Friday, May, 17, 2002, the due date for the forms, at which point he discovered that the subordinate had not completed the task. Id. at 115. Plaintiff asked Mr. Jones if he could return the forms to him by the following Monday and Mr. Jones agreed to this extension. Id. Plaintiff went to work on Sunday to locate the three employees who had not signed the uniform

order forms. Id. Two of these employees were at work and they signed the forms. Id. One employee, Ms. Smith, had called in sick that day. Plaintiff tried several times to contact her by phone with no success. Id. at 116. Plaintiff left work and later called Sam Chiwetalu, a supervisor on duty, and asked him to call Smith and tell her that Plaintiff would be stopping

by her house to get this form signed. Plaintiff got Smith's address from her emergency contact form at work. Id. at 122. Plaintiff went to Smith's apartment that evening, knocked on the door and, after no one answered, walked around the side of the apartment and looked to see if any lights were on in the house. Id. at 123. After seeing lights on, he returned and knocked on the door again. No one answered. Id. Plaintiff then returned to his car, parked in the parking lot of the

apartment complex, and proceeded to wait there for three hours, at which point it was approaching midnight. Id. at 124. Plaintiff then knocked on the door again. Plaintiff thought he heard some ask "Who is it?" and then identified himself, but no one answered the door and Plaintiff left. Id. at 124-125. Plaintiff obtained Ms . Smith's signature on the form on Monday morning after roll-call. Id .

Sabrina Smith filed a complaint against Plaintiff regarding his presence at her apartment on the evening of May, 19, 2002. The complaint stated that Plaintiff rang her bell repeatedly at 9:30 p.m. and then peered into her patio window after she did not respond. Smith stated that she observed Plaintiff return to his car and wait there before returning to her apartment and ringing the bell again after midnight. Smith reported that she felt stalked. Id. Defendant placed Plaintiff on administrative leave with pay on May, 21, 2002 and started an internal investigation into the incident.

Dep. Bell [37], Ex. 11. Defendant submits evidence that Plaintiff did not have authorization from Mr. Jones to go to Sabrina Smith's residence and Plaintiff does not contend otherwise. At the conclusion of the investigation, Defendant terminated Plaintiff.

Because a Plaintiff bears the burden of establishing that a Defendant's reasons are a pretext for discrimination, a Plaintiff "must present 'significantly probative' evidence on the

issue to avoid summary judgment." Young v . General Foods Corp., 840 F.2d 825, 829 (llth Cir. 1988) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-25, 106 S. Ct. 2548, 2552-2554, 91 L.Ed.2d 265 (1986)). "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where a

Defendant has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." Young, 840 F.2d at 830. In this case, Plaintiff has not provided probative evidence of pretext to avoid summary judgment on this claim. The undisputed evidence demonstrates that Plaintiff failed to timely complete an assignment and received an extension of the deadline to complete the task when he requested one. Of his own accord, after obtaining the employee's home address from her emergency contact form, Plaintiff decided to go to her house in the evening in an attempt to complete his assignment within the extended deadline. It is undisputed that Plaintiff did not have authorization to obtain his subordinate's signature at her residence during off-duty hours. Contrary to the report and recommendation, the evidence does not support the inference that Mr. Jones effectively required Plaintiff to goo to Ms. Smith's residence in order to complete the assignment.

Rather, the record reflects that Plaintiff failed to complete an assignment on time, asked for and received an extension of the deadline, and then chose to go to his subordinate's place of residence at night to get her signature and knock repeatedly at her door until after midnight. Based on this uncontroverted evidence, Plaintiff has not established that Defendant's reason for terminating Plaintiff is pretextual and the motion for summary judgment on this claim is GRANTED.

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Post-Termination Retaliation

The report and recommendation concluded that Plaintiff alleged a post-termination retaliation claim in his pro se complaint when he alleged that Defendant provided false and defamatory information to prospective employers in retaliation for filing a charge of discrimination with the

Equal Employment Opportunity Commission regarding his termination. See Complaint [1] at 9. The Court agrees with this reading of the Complaint. The report and recommendation also concluded that Defendant misread the Complaint when it construed this allegation as a state law slander claim; therefore, the Magistrate Judge recommends that this claim should proceed because Defendant failed to move for summary judgment. Defendant responds that judicial economy calls for substantively addressing this claim at the summary judgment stage and the Court agrees with this position. The Court grants Defendant leave to move for summary judgment in the district court on the one remaining claim in this case: retaliation in connection with Defendant's post-termination treatment of Plaintiff. Defendant should file the motion addressing this claim within thirty (30) days of the date of this Order.

CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment [38] is GRANTED. The Defendant is further provided with leave to file a motion for summary judgment out-of-time on the remaining retaliation claim within thirty (30) days of the date of this Order. Consistent with the Court's findings stated herein, it ADOPTS IN PART and

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REJECTS IN PART the Report and Recommendation [46] .

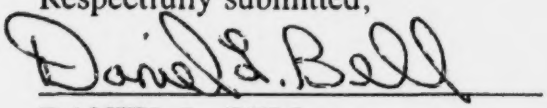
It is so ORDERED this 8 day of August, 2005.

Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States District Court

The above July 8, 2005 Report and Recommendation and August 8, 2005 Order were filed on the date that they were ordered.

This 20th day of September, 2006.

Respectfully submitted,



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